

46 Am. Jur. 2d Judges § 134

American Jurisprudence, Second Edition | February 2022 Update

Judges

Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IX. Disqualification to Act in Particular Case

B. Grounds for Disqualification

4. Bias or Prejudice as Grounds for Disqualification

b. Appearance of Bias and Partiality as Grounds for Disqualification

§ 134. Appearance of judge's bias and partiality, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#)  49(1), 49(2)

The inquiry into actual bias is just one step that the judge must take in deciding whether to recuse him- or herself; objective standards may also require recusal whether or not actual bias exists or can be proven.¹ Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.² Thus, any tribunal permitted by law to try cases or controversies must not only be unbiased, but must avoid even the appearance of bias.³

Even if a judge is convinced of his or her own impartiality, disqualification is nonetheless required if circumstances compromise the appearance of fairness and impartiality, such that the parties and the public are left with substantial doubt as to the ability of the judge to fairly and impartially resolve pending litigation.⁴ The appearance of bias or prejudice can be as damaging to public competence and the administration of justice as actual bias or prejudice and is sufficient to warrant disqualification of a judge even in the absence of actual prejudice.⁵ Acts or conduct which give the appearance of partiality should be avoided with the same degree of zeal as acts or conduct which inexorably bespeak partiality. Where a judge's freedom from bias or his or her prejudgment of an issue is called into question, the inquiry is no longer whether he or she actually is prejudiced; the inquiry is whether an onlooker might on the basis of objective facts reasonably question whether he or she is so.⁶

Observation:

Not all judicial partiality requires disqualification. "Partiality," as a basis for the disqualification of a judge, does not refer to all favoritism, but only to such as is, for some reason, wrongful or inappropriate.⁷

CUMULATIVE SUPPLEMENT

Cases:

In foreclosure action where mortgagee failed to produce evidence that entity named as assignee of mortgage had been renamed to party named as plaintiff, trial judge was not permitted to conduct independent research of the renaming, prompt mortgagee to reopen the case, and admit document he found into evidence; whether intentional or not, the trial judge gave the appearance of partiality by taking sua sponte actions which benefited one party over the other. Fla. Code of Jud. Conduct, Canon 3B(7). [DiGiovanni v. Deutsche Bank National Trust Company](#), 226 So. 3d 984 (Fla. 2d DCA 2017).

Any error in judge's failure to recuse himself under the Code of Judicial Conduct from presiding over trial for aggravated criminal sodomy and other crimes, based on judge's father-son relationship with law enforcement officer who participated in defendant's arrest, was harmless beyond a reasonable doubt, where judge's son did not testify and jury was never informed that judge had a relative that was involved in the case in any capacity. Sup.Ct.Rules, Rule 601B, Code of Jud.Conduct, Canon 2, Rule 2.11(A)(2)(d). [State v. Moyer](#), 410 P.3d 71 (Kan. 2017).

Trial judge was not actually biased against defendant, and thus trial judge's administration of wiretap investigation in addition to sitting as trial judge did not constitute structural error in prosecution for drug offenses and pattern of corrupt activity; potential for bias did not amount to actual bias, wiretap documents did not paint picture of judge involved in investigation to such extent that his impartiality would be called into doubt by objective observer, trial judge signed warrants and applications for warrants, and violation of rule that judge who heard large quantity of inflammatory information should not sit as trial judge was not per se prejudicial. [Ohio Crim. R. 16\(F\)](#). [State v. Pippins](#), 2020-Ohio-503, 151 N.E.3d 1150 (Ohio Ct. App. 10th Dist. Franklin County 2020), appeal not allowed, 159 Ohio St. 3d 1408, 2020-Ohio-3174, 146 N.E.3d 589 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Caperton v. A.T. Massey Coal Co., Inc.](#), 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009).
As to a discussion of actual bias and prejudice, and various principles based thereon, see §§ 123 to 133.
- 2 [Williams v. Pennsylvania](#), 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016).
Due process requires the appearance as well as the fact of impartiality. [Swift v. Kniffen](#), 706 P.2d 296 (Alaska 1985).
- 3 [Williams v. Pennsylvania](#), 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016); [Greenway v. Heathcott](#), 294 P.3d 1056 (Alaska 2013); [Butler v. State](#), 95 A.3d 21 (Del. 2014); [Carpenter v. U.S.](#), 144 A.3d 1141 (D.C. 2016); In re Advisory Letter No. 7-11 of Supreme Court Advisory Committee on Extrajudicial Activities, 213 N.J. 63, 61 A.3d 136 (2013); [O'Neill v. O'Neill](#), 2016 SD 15, 876 N.W.2d 486 (S.D. 2016).

The party claiming judicial bias must show the existence of bias, the likelihood of bias, or an appearance of such bias that the judge is unable to hold the balance between vindicating the interests of the court and the interests of a party. [In re Tapply](#), 162 N.H. 285, 27 A.3d 628 (2011).

With respect to judicial disqualification, justice must satisfy the appearance of justice. [State v. McCabe](#), 201 N.J. 34, 987 A.2d 567 (2010).

[People v. Schupper](#), 124 P.3d 856 (Colo. App. 2005), decision *aff'd*, 157 P.3d 516 (Colo. 2007).

[In Interest of McFall](#), 533 Pa. 24, 617 A.2d 707 (1992).

The mere appearance of bias in a judge, however difficult, if not impossible, to quantify, is sufficient to erode respect for the judiciary, and to that end, judges must refrain from sitting in any causes where their objectivity and impartiality may fairly be brought into question. [In re Advisory Letter No. 7-11 of Supreme Court Advisory Committee on Extrajudicial Activities](#), 213 N.J. 63, 61 A.3d 136 (2013).

[State v. Garner](#), 760 S.W.2d 893 (Mo. Ct. App. S.D. 1988).

As to the "reasonably be questioned" standard, see § 135.

[O'Neill v. O'Neill](#), 2016 SD 15, 876 N.W.2d 486 (S.D. 2016).

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